85-1542

No.....

Supreme Court, U.S.
FILED
MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

—o—

FRANK W. ORLEANS,

Petitioner,

v.

THE CITY OF WILDWOOD HOUSING AUTHORITY, et als.,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

DIZZIA & MULLIN, P.C.
86 Hudson Street
Hoboken, New Jersey 07030
By NEIL MULLIN, Esq. counsel
of record for the petitioner.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

38 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a district court, having dismissed an action for want of subject matter jurisdiction may, months thereafter, exercise its jurisdiction by ordering a party to the dismissed action to pay attorneys fees?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Frank W. Orleans, appellant below

The City of Wildwood Housing Authority, appellee below

Defendants in the District Court who were not parties to the appeal to the Third Circuit Court of Appeals: William G. Cottman, Sr., Grace Gardiner, Ellen Brown, Ethel Johnson, Clifford Mocabee, Martin A. Rosenfeld, Anthony Iorio, Stephen S. Rubins, Richard Reinman and Leo Dyce.

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OPINIONS BELOW

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—o—

JURISDICTION

The judgment of the Third Circuit Court of Appeals was filed on November 18, 1985. [App.14] A timely petition for rehearing in banc was denied on December 16, 1985. [App.16] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

—o—

STATUTORY PROVISION INVOLVED

. . . "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may

allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988.

———o———

STATEMENT OF THE CASE

The petitioner Frank W. Orleans filed a complaint in federal district court alleging that the defendants violated his rights under the First and Fourteenth Amendments of the United States Constitution. He alleged that he was hired as an expert architectural witness by a public housing authority and was denied payment for his services in retaliation for his expressing an opinion, at a meeting, that the hiring agency itself was at fault for the presence of serious defects in certain public housing. The action was brought pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988 and jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 and 1343. [See Complaint, App. 18.]

On July 31, 1984, the district court dismissed the complaint "for lack of subject matter jurisdiction." The Court expressly declined to reach the issue of failure to state a claim upon which relief can be granted. [App.4]

Although it had no jurisdiction over the matter, on February 13, 1985, the district court purported to exercise jurisdiction by entering an order, pursuant to 42 U.S.C. § 1988, requiring the petitioner to pay the defendant City of Wildwood Housing Authority $5,350 in attorney's fees.

Without hearing oral argument, the Third Circuit Court of Appeals affirmed the aforesaid award of attorney's fees on November 18, 1985 without opinion. A timely petition for rehearing in banc was denied on December 16, 1985.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE THIRD CIRCUIT COURT OF APPEALS SANCTIONED A DEPARTURE BY THE DISTRICT COURT SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The district court in this matter has so far exceeded its power that this Court should exercise its supervisory power to remedy the situation. It is elementary that "the validity of an order of a federal court depends upon that court's having jurisdiction over *both* the subject matter and the parties." *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694 (1982). See also, *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Thompson v. Whitman*, 18 Wall. 457 (1874).

Here, the district court expressly ruled that it had no subject matter jurisdiction over the complaint and dismissed it. Months later, though lacking subject matter jurisdiction, the court purported to exercise jurisdiction by assessing fees against the petitioner pursuant to 42 U.S.C. § 1988. The Third Circuit, in direct violation of this Court's ruling in *Compagnie Des Bauxites*, supra, lent validity to that abuse of judicial power by affirming the fee award.

This Court has ruled that "[s]ubject matter jurisdiction . . . is an Article III as well as a statutory requirement. . . The rule is *inflexible and without exception*, which requires this court . . . to deny jurisdiction . . . in all cases where such jurisdiction does not appear affirmatively in the record." *Compagnie Des Bauxites*, supra, 456 U.S. at 702. (emphasis supplied)

Thus, 42 U.S.C. § 1988 cannot create an "exception" to the constitutionally mandated rule that absent subject matter jurisdiction, a district court has no power to act against a party. Indeed, various federal courts have held to that effect. Section 1988 "does not create rights nor [does it] confer jurisdiction." *Barr v. U.S.*, 478 F.2d 1152, 1156 (10th Cir. 1973), *cert. den.* 414 U.S. 910 (1974). "Sections 1986 and 1988 provide no independent [source of] jurisdiction. *Locust v. Degiovanni*, 485 F.Supp. 551, 552 n.1 (E.D. Pa. 1980)." "42 U.S.C. 1988 does not represent a grant of subject matter jurisdiction." *Dema v. Feddor*, 470 F. Supp. 152,157 n.6 (N.D. Ill.E.D. 1979).

In *Citizens Bank of Louisiana v. Cannon*, 164 U.S. 319 (1896), this Court reviewed a decree dismissing, for want of subject matter jurisdiction, a suit in equity brought by a bank seeking to enjoin an enforcement action for collection of taxes. The lower court had awarded attorney's fees and costs to the prevailing party. This Court reversed the award of fees and costs holding that "having dismissed the bill for want of jurisdiction, the court was without power to decree the payment of costs and penalties." *Id.*, 164 U.S. at 324.

Here too the court was without power to entertain a fee application after dismissal of the complaint for want of subject matter jurisdiction. To allow the decision below to stand is to undermine elementary principles about the limited nature of federal jurisdiction.

———o———

CONCLUSION

A writ of certiorari should be granted so that this Court may exercise its supervisory function in order to correct the gross departure by the court below from the accepted and usual course of judicial proceedings.

Respectfully submitted,

DIZZIA & MULLIN, P.C.

/s/ NEIL MULLIN, Esq.

Dated: March 16, 1986

APPENDIX

OPINION
(Filed July 3, 1984)

APPEARANCES:

Neil Mullin, Esquire
86 Hudson Street
Hoboken, New Jersey 07030
Attorney for Plaintiff

Norman L. Zlotnick, Esquire
Blatt, Mairone, Biel, Zlotnick,
Feinberg & Griffith, P.C.
3201 Atlantic Avenue
Atlantic City, New Jersey 08401
Attorney for Municipal Defendants

W. Hunt Dumont, United States Attorney
By: Irene Dowdy, Assistant U. S. Attorney
402 East State Street, Room 265
Trenton, New Jersey 08608
Attorney for Federal Defendants

BROTMAN, District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-2718

FRANK W. ORLEANS,

Plaintiff,

v.

THE CITY OF WILDWOOD HOUSING AUTHORITY, WILLIAM G. COTTMAN, SR., GRACE GARDINER, ELLEN BROWN, ETHEL JOHNSON, J. CLIFFORD MOCABEE, MARTIN A. ROSENFELD, ANTHONY IORIO, STEPHEN S. RUBINS, RICHARD REIMAN, LEO DYCE,

Defendants.

This is an action brought by plaintiff Frank Orleans pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and 1988, against defendants, the City of Wildwood Authority and its Commissioners, William G. Cottman, Sr., Grace Gardiner, Ellen Brown, Ethel Johnson, J. Clifford Mocabee, Martin A. Rosenfeld and Anthony Iorio; Richard Reiman, the assistant regional counsel of the United States Department of Housing and Urban Development ("HUD"); Leo Dyce, the Deputy Director of Housing Production for HUD in Newark, New Jersey; and Stephen S. Rubins, Esquire, the attorney for the Housing Authority. Jurisdiction is conferred under 28 U.S.C. §§ 1331 and 1343. Presently before the court is defendants' motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons which follow, defendants' motion to dismiss will be granted.

In his complaint, plaintiff alleges that on or about May 2, 1980, the City of Wildwood Housing Authority ("Authority") and its Commissioners entered into a contract with the plaintiff whereby plaintiff was to provide certain architectural consultant services in anticipation of litigation. The plaintiff was to be paid an hourly wage plus costs, not to exceed $10,000. On or about October 28, 1980, this contract was amended and the $10,000 limit was raised to $20,000.

During the spring of 1981, the Authority and its Commissioners along with the remaining two defendants allegedly ordered the plaintiff to prepare an interim report identifying construction and design defects and to sug-

gest responsibility for such defects. The plaintiff further alleges that the defendants knew the plaintiff had virtually exhausted the $20,000 allocated to him and that they did not inform him that he would not be paid for this additional work.

On April 24, 1981, the plaintiff made an oral presentation concerning the results of his investigation. The plaintiff claims that this presentation was attended by defendants Reiman, Dyce and Rubins. In this presentation, the plaintiff indicated among other things, that he found serious defects in the housing facility and that both HUD and the Authority were probably partially responsible for such deviations. The plaintiff alleges that Dyce expressed displeasure with the plaintiff's comments about potential fault in the construction project and stated that such comments should not be included in the final report.

The plaintiff submitted a detailed statement of services performed and invoices but the Authority has refused to pay any money in excess of the $20,000 limit. The plaintiff alleges that the defendants should have known that the plaintiff was exceeding the $20,000 limit, and that the defendants refused to pay the plaintiff because of their disagreement with opinions expressed in plaintiff's oral and final reports concerning the possibility of government liability in connection with the project. The plaintiff therefore contends in Count 1, that this is a violation of his First, Fifth and Fourteenth Amendment rights, thus entitling him to the court's jurisdiction pursuant to Title 28 U.S.C. §§ 1331 and 1343. In Count 2, plaintiff sues under a state law breach of contract claim.

A federal court has jurisdiction over constitutional claims if they are "sufficiently substantial." *Hagans v. Lavine,* 415 U.S. 528, 536 (1974). The Third Circuit further defined this test in *Murrow v. Clifford,* 502 F.2d 1066, 1068 (3rd Cir. 1974):

> To be jurisdictionally insubstantial a claim must be so attenuated and unsubstantial as to be absolutely devoid of merit, or clearly foreclosed by the decisions of the Supreme Court so as to leave no room for the inference that the question sought to be raised can be the subject of the controversy.

Thus the test is a stringent one and most constitutional claims, even though of questionable merit, will be substantial enough for jurisdictional purposes. However, the court finds that the present constitutional claim falls within that small category of "jurisdictionally insubstantial" claims.

The plaintiff's remedy, if any, lies in contract. The plaintiff was hired as a consultant under a written contract which underwent a written modification and an alleged oral or mutually understood modification. The total amount of compensation for services to which plaintiff is entitled must be determined under contract law including the language of the contract and the effect of any subsequent dealings with the defendants. Whether plaintiff may recover monies in excess of $20,000 is a question of the terms of the modified contract.

Plaintiff in essence argues that he can avoid a contract analysis of his claims because his contract is with a government entity and governmental employees. Plaintiff cites no authority for this argument. The fact that plaintiff's contract was with a governmental agency does not

turn a breach of contract claim into a constitutional violation. If the plaintiff's rights were violated by withholding money in breach of the contract, then the plaintiff may recover under contract principles. The entire incident complained of revolves around contract issues and plaintiff's freedom of expression claim is peripheral and frivolous and cannot withstand a *Hagans* analysis. This is simply not the type of action which gives rise to the invocation of jurisdiction under 28 U.S.C. §§ 1331 or 1343.

Thus Count 1 of plaintiff's complaint must be dismissed. As to Count 2, the federal courts' retention of jurisdiction over a claim based on state law may be sustained only if the constitutional claim is substantial. *See Warrington Sewer Company v. Tracy*, 463 F.2d 771 (3rd Cir. 1972). Because the constitutional claim in Count 1 was not deemed substantial but was instead dismissed, the state law claim in Count 2 must also be dismissed. Plaintiff may, of course, pursue this breach of contract claim in a state court.

For the foregoing reasons, defendants' motion to dismiss the complaint for lack of subject matter jurisdiction will be granted. The court, therefore, need not reach defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

An appropriate order will be entered.

/s/ Stanley S. Brotman, U.S.D.J.

Dated: July 31, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-2718

FRANK W. ORLEANS,

Plaintiff,

v.

THE CITY OF WILDWOOD HOUSING AUTHORITY, WILLIAM G. COTTMAN, SR., GRACE GARDINER, ELLEN BROWN, ETHEL JOHNSON, J. CLIFFORD MOCABEE, MARTIN A. ROSENFELD, ANTHONY IORIO, STEPHEN S. RUBINS, RICHARD REIMAN, LEO DYCE,

Defendants.

ORDER
(Filed July 3, 1984)

This matter having come before the court on the 10th day of July, 1984; and

The court having considered the motion and submissions of the parties; and

For the reasons stated in the court's opinion filed this date,

It is on this 31st day of July, 1984, hereby ORDERED that defendants' motion to dismiss the Complaint is GRANTED.

No costs.

/s/ Stanley S. Brotman
U.S.D.J.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

February 12, 1985

(Filed February 13, 1985)

CHAMBERS OF STANLEY S. BROTMAN, JUDGE
230 UNITED STATES COURT HOUSE
P. O. BOX 1029, CAMDEN, N. J. 08101

Neil Mullin, Esquire
86 Hudson Street
Hoboken, New Jersey 07030

Norman L. Zlotnick, Esquire
Blatt, Mairone, Biel, Zlotnick,
Feinberg & Griffith
3201 Atlantic Avenue
Atlantic City, New Jersey 08401

Irene Dowdy, Esquire
Assistant U. S. Attorney
402 E. State Street, Room 265
Trenton, New Jersey 08608

Re: Frank W. Orleans v. The City of Wildwood Housing Authority, et al. — Civil Action No. 83-2718

Dear Counsel:

Plaintiff Frank W. Orleans brought this action against the City of Wildwood Housing Authority ("Housing Authority"), the commissioners and several officers of the Housing Authority, and two officials of the United States Department of Housing and Urban Development. The complaint states claims based on the First, Fifth and Fourteenth Amendments to the United States Constitution and New Jersey contract law. Plaintiff asserts his federal claims pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988. Accordingly, plaintiff invoked this court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

This action arose out of a contract between the Housing Authority and plaintiff, who is an architectural consultant. In anticipation of litigation, the Housing Authority arranged for plaintiff to conduct an analysis of possible defects in the construction of several structures managed by the agency. According to the complaint, defendants withheld payment for certain services performed by plaintiff in retaliation for his statements to the effect that defendants are responsible for serious defects in the housing projects he studied. Plaintiff alleged that defendants sought his views and then penalized him for expressing opinions inconsistent with their own. Defendants contended that plaintiff's job was to supply technical analysis only, and that he received full payment for his services under the parties' agreements.

In a decision issued July 31, 1984, the court granted defendants' motion to dismiss for lack of subject matter jurisdiction. At that time, the court ruled that it lacked power to hear this case as plaintiff had failed to state a "sufficiently substantial" federal claim under the doctrine set forth in *Hagans v. Levine*, 415 U.S. 528, 536 (1974). Presently before the court is a motion by defendant Housing Authority for an award of attorneys fees and costs pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

Under 42 U.S.C. § 1988, "[a] prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429, n.2 (1983). It is unnecessary for a prevailing defendant to show that an opponent filed an action in "subjective bad

faith''; rather, it is sufficient to demonstrate that a plaintiff's claim is unreasonable or without foundation. *Id.*, citing *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421 (1978).

In this case, the court previously ruled that plaintiff's ''constitutional claim falls within that small category of 'jurisdictionally insubstantial' claims.'' Opinion of July 31, 1984, at 3. The court concluded that although the complaint raised issues of New Jersey contract law, plaintiff's federal cause of action is ''peripheral and frivolous.'' *Id.* at 4, citing *Hagans, supra,* and *Murrow v. Clifford,* 502 F.2d 1066, 1068 (3rd Cir. 1974). The test for finding a claim ''jurisdictionally insubstantial'' is a stringent one, but the court remains confident that ''[t]he plaintiff's remedy, if any, lies in contract.'' *Id.* at 3.

There can be no doubt that the court's prior decision in this case constitutes a valid basis for assessment of legal costs and fees in favor of defendant under the decisions in *Hensley, supra, and Christianburg, supra.* In spite of the court's finding that plaintiff's federal claim is frivolous, plaintiff urges the court to rule out a fee award on the grounds that plaintiff's counsel had a reasonable basis for believing such a claim was valid. Plaintiff asserts that he filed suit only after conducting extensive research and after receiving encouragement from an experienced civil rights attorney. According to plaintiff, these sources suggested that he had a good chance of prevailing on what he concedes to be a question for first impression. In such cases, plaintiff contends, *Christianburg* cautions the courts to avoid fee awards to prevailing defendants in order to avoid a ''chilling effect'' on creative civil rights litigation.

Unsuccessful lawsuits raising novel legal theories may have merit even though they are not based on extensive legal precedent. Such initiatives are justified if counsel present a coherent legal argument supported, if only indirectly, by appropriate policies and authorities. In this case, however, plaintiff has yet to explain his federal cause of action in anything other than cursory and conclusory fashion.

Plaintiff's brief in opposition to the motion to dismiss devotes just three scanty paragraphs to a legal theory he admits to be novel. Even after reviewing plaintiff's brief in opposition to the present motion, the court is still unable to discern how plaintiff believes the court can justify a major extension of *Pickering v. Board of Education,* 391 U.S. 563 (1968) to apply to independent contractors as well as public employees. Plaintiff's superficial legal analysis is no more plausible simply because plaintiff's counsel contends that the § 1983 claim was endorsed by a knowledgeable, respected civil rights lawyer. The court notes that counsel for plaintiff has failed to present any detailed indication *why* the lawyer he consulted believed plaintiff had a colorable claim under the civil rights laws. Plaintiff's failure to document his § 1983 claim supports the conclusion that this case should not have been brought in federal court, and that the defendant Housing Authority is entitled to an award of fees.

Plaintiff also asserts that defendant's motion for fees is untimely and brought in bad faith. In fact, the Housing Authority moved for a fee award roughly four months after expiration of the filing deadline for an appeal of this court's order dismissing the complaint, and

three days after plaintiff initiated a contract action against plaintiff in New Jersey Superior Court. Plaintiff insists that if defendant had requested fees earlier, plaintiff could have filed an appeal, which, if successful, would have avoided the prospect of liability for fees.

An application for attorney's fees should be denied as untimely if the lateness of its filing causes unfair surprise or prejudice. *Inmates of Allegheny County Jail v. Pierce,* 716 F.2d 177, 179 (3rd Cir. 1983), citing *White v. New Hampshire Department of Employment Security,* 455 U.S. 445, 454 (1982). Where as here, no local rule governs the timeliness of a fee application, a matter such as this is within the discretion of the district court. *Id.* The court finds no unfair surprise or prejudice due to defendant's fee application in this case. Plaintiff's contention that the fee application is untimely because an appeal is no longer possible amounts to a declaration that this court should adopt a rule setting specific time limits on fee applications which parallel rules governing the time for filing appeals. Such a rigid principle is not established in this district. The court is also unimpressed by plaintiff's claim that defendant's fee application is a retaliatory ploy. Plaintiff has alleged nothing substantial to support his charge other than the coincidence of the filing date of this motion and that of his own action in state court.

In assessing defendant's fee request, the first step is to identify a "lodestar" figure: an initial estimate equal to "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley, supra,* 461 U.S. at 433; *see also Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., et al.*

("Lindy II"), 540 F.2d 102, 108 (3rd Cir. 1976) (instructions for calculation of the "lodestar"). If documentation of either component of this figure is inadequate, the trial judge "may reduce the award accordingly." *Hensley, supra.* Compensation should be denied for hours which are "excessive, redundant or otherwise unnecessary." *Id.* at 434.

Counsel for defendant has submitted an affidavit setting forth a daily account of hours spent on this matter. For each daily entry, defendant has listed total time expended and activities performed. The time entries are recorded to the nearest five minutes. The subject entries are rather general, but they distinguish between such activities as research, discussions with client and counsel, and written work. The affidavit accounts for a total of 63 hours. Counsel for defendant alleges that he was paid $100.00 per hour for his time by the Housing Authority. Accordingly, counsel for defendant requests $6,300 in legal fees as well as $105.93 in various expenses, for a total request of $6,450.93. Affidavit of Norman L. Zlotnick, December 13, 1984.

Plaintiff objects that defendant's fee request, as a whole, is inadequately documented. In the alternative, plaintiff urges reduction of the fee award on several grounds.

The failure of defendant's counsel to submit records of contemporaneous time sheets is cited by plaintiff as a basis for denying all fees and costs. In support of this proposition, plaintiff cites several cases decided in the Second Circuit; however, plaintiff has cited no authority from this Circuit which expresses a preference for original

time records. Under *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., et al.* ("Lindy I"), 487 F.2d 161 (3rd Cir. 1973), a fee petition is adequately documented so long as it provides "some fairly definite information as to the hours devoted to various general activities." 487 F.2d at 167. The court finds defendant's affidavit sufficiently detailed to suggest that it accurately represents time expended on this litigation. Accordingly, plaintiff's demand for the defendant to produce contemporaneous time records is without merit. The specificity of the affidavit by defendant's counsel also renders unpersuasive plaintiff's broad and unsubstantiated claim that defendant's counsel could not have expended so much time on this matter.

Next, the court finds that there is no validity to plaintiff's claim that any fee award should be reduced to allow for time spent on plaintiff's contract claim, because the court failed to reach the merits of that claim in its opinion granting the motion to dismiss. Plaintiff appears to argue that defendant is barred from seeking fees for work on a claim unrelated to the outcome of the litigation. *See Hughes v. Repko*, 578 F.2d 483, 486-87 (3rd Cir. 1978). This argument ignores the fact that the federal and state claims in this case are closely connected. In addition, defendant's analysis of plaintiff's contract claims contributed to the court's ultimate conclusions in this matter, that contract issues are the heart of the case, and that plaintiff's federal civil rights are insubstantial.

Finally, plaintiff contends that the Housing Authority's fee award should be reduced to the extent that it reflects claims for non-legal services and for unproductive

time. The court concurs with most of these objections. No compensation is appropriate for six hours, ten minutes defendant's counsel spent attending court on July 6, 1984, when the court was to announce its decision on the motion to dismiss. No oral argument was presented on that day, and thus these hours were "unnecessary" to the resolution of this case. *Hensley, supra,* 461 U.S. at 434.

Plaintiff should also not pay for the full time billed on January 24, 1984, as it exceeds the duration of a pretrial conference held on that date. Defendant concedes that he spent much of his time that day waiting for the meeting to take place. Defendant is also entitled to only partial credit for June 29, 1984 and July 3, 1984, when defendant's counsel charged time for "duplicating documents." Such charges should be treated as overhead expenses rather than legal services. In short, the court finds such charges to be "excessive." *Hensley, supra,* 461 U.S. at 434. Under the circumstances, it is fair to allow only half the six hours forty-five minutes claimed for these three days. The expenses claimed by defendant's counsel also appear to consist mostly of ordinary overhead costs usually financed by legal fees. They too are excessive and not properly recoverable.

No grounds have been presented to challenge the hourly rate proposed by defendant. The rate of $100 per hour appears to be the "normal billing rate" for defendant's counsel. In any case, such a rate is the fee defendant's counsel was actually able to command in the market for his services. Consequently, the court finds this fee reasonable under *Lindy I, supra,* 487 F.2d at 167, and will apply this rate to the total hours documented by defendant's

counsel, less the nine-and-one-half hours which must be deducted for reasons discussed above. Total fees therefore amount to $5,350.

Two other factors must be considered in evaluating a petition for attorney's fees: the quality of the attorney's work and the contingent nature of success. *Lindy I, supra,* 487 F.2d at 168. The latter factor is not applicable to defendant's fee application. The work of defendant's counsel has been satisfactory; his performance merits neither an increase nor a decrease in the lodestar.

Conclusion

The motion by defendant City of Wildwood Housing Authority for an award of attorney's fees, pursuant to 42 U.S.C. § 1988, is granted. The amount of fees to be paid by plaintiff is set at $5,350. An appropriate order will be entered.

Very truly yours,

/s/ Stanley S. Brotman

SSB:mhg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-2718

FRANK ORLEANS,

Plaintiff,

v.

THE CITY OF WILDWOOD HOUSING AUTHORITY, WILLIAM G. COTTMAN, SR., GRACE GARDINER, ELLEN BROWN, ETHEL JOHNSON, J. CLIFFORD MOCABEE, MARTIN A. ROSENFELD, ANTHONY IORIO, STEPHEN S. RUBINS, RICHARD REIMAN, LEO DYCE,

Defendants.

ORDER
(Filed February 13, 1985)

This matter having come before the court on the 1st day of February, 1985; and

The court having considered the submissions of the parties and record in this case; and

For the reasons stated in the court's letter opinion filed this date,

It is on this 12th day of February, 1985, hereby ORDERED that:

1. The motion by defendant City of Wildwood Housing Authority for an award of attorney's fees, pursuant to 42 U.S.C. § 1988, is GRANTED; and

2. Plaintiff shall pay to defendant the sum of $5,350 representing counsel fees accrued by defendant Housing Authority in this matter.

No costs.

/s/ Stanley S. Brotman
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-5207

FRANK W. ORLEANS,

Appellant

v.

THE CITY OF WILDWOOD HOUSING AUTHORITY, WILLIAM G. COTTMAN, SR., GRACE GARDINER, ELLEN BROWN, ETHEL JOHNSON, CLIFFORD MOCABEE, MARTIN A. ROSENFELD, ANTHONY IORIO, STEPHEN S. RUBINS

On Appeal from the United States District Court
for the District of New Jersey — Camden
(D.C. No. 83-2718)

District Judge: Honorable Stanley S. Brotman

Submitted Under Third Circuit Rule 12(6)
November 6, 1985

Before: SEITZ, WEIS, and ROSENN, *Circuit Judges*

JUDGMENT ORDER

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on November 6, 1985.

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs-taxed against appellant.

BY THE COURT,

/s/ Max Rosenn
Circuit Judge

Attest:
/s/ Sally Mrvos
Clerk

Dated: Nov. 18th, 1985

Certified as a true copy and issued in lieu of a formal mandate on December 24, 1985.

Test: Frances R. Matipik

Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Costs taxed in favor appellee as follows:
Brief.....$40.51

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5207

FRANK W. ORLEANS,

Appellant,

v.

THE CITY OF WILDWOOD HOUSING AUTHORITY, WILLIAM G. COTTMAN, SR., GRACE GARDINER, ELLEN BROWN, ETHEL JOHNSON, CLIFFORD MOCABEE, MARTIN A. ROSENFELD, ANTHONY IORIO, STEPHEN S. RUBINS,

Appellees.

(Civil Action No. 83-2718 — D. of N. J. — Camden)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and ROSENN, *Circuit Judges.*

The petition for rehearing in banc filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Circuit Judge

DATED: December 16, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 83-2718

MULLIN & CASTELEIRO
86 Hudson Street
Hoboken, New Jersey 07030
(201) 656-1000

FRANK W. ORLEANS,

Plaintiff,

v.

THE CITY OF WILDWOOD HOUSING AUTHORITY, WILLIAM G. COTTMAN, SR., GRACE GARDINER, ELLEN BROWN, ETHEL JOHNSON, CLIFFORD MOCABEE, MARTIN A. ROSENFELD, ANTHONY IORIO, STEPHEN S. RUBINS, RICHARD REINMAN, LEO DYCE,

Defendants..

COMPLAINT AND
DEMAND FOR JURY TRIAL

(Filed July 21, 1983)

FRANK W. ORLEANS, A.I.A., having his principal place of business at 117 Fairview Avenue, New Providence, New Jersey, by way of complaint against the defendants says:

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. sections 1331 and 1343 in that this is an action arising under the First, Fifth and Fourteenth Amendments of the United States Constitution as well as the 42 U.S.C. sections 1983, 1985, 1986 and 1988.

2. The pendent jurisdiction of this Court is invoked to provide redress for claims arising under the laws of the State of New Jersey in regard to contractual breach.

3. While not admitting its applicability in this matter, the Plaintiff has fully complied with the terms and conditions of the New Jersey Contractual Liability Act, N.J.S. 59:13-1, *et seq.*

PARTIES

4. The plaintiff, Frank W. Orleans, A.I.A., is in the business of providing architectual and architectural consultant services.

5. The defendant, The City of Wildwood Housing Authority, is a body corporate and politic, with its principal place of business at 3700 New Jersey Avenue, Wildwood, New Jersey (hereinafter referred to as the "Authority").

6. The defendant William G. Cottman, Sr. has been at time relevant to this action, the Executive Director of the Authority.

7. All other named defendants, with the exception of Stephen S. Rubins, Richard Reinman and Leo Dyce, have been Commissioners of the Authority during all times relevant to this litigation.

8. The defendant Stephen S. Rubins has been, during the period relevant to this litigation, the attorney for the Authority.

9. The defendant Richard Reinman has been, during the period relevant to this litigation, assistant regional

counsel in the New York, New York regional offices of the Department of Housing and Urban Development of the United States of America (hereinafter HUD).

10. The defendant Leo Dyce has been during the period relevant to this litigation, Deputy Director of Housing Production in the Newark, New Jersey offices of the Department of Housing and Urban Development of the United States of America.

CLAIMS FOR RELIEF

COUNT I

11. On or about May 2, 1980 the Authority and defendants on behalf of the Authority and plaintiff entered into a contract whereby plaintiff was to provide certain expert/consultant services in connection with a legal dispute between one Joseph W. Remedio, a contractor, Francis G. Vitetta Associates, an architectural firm and the Authority.

11. In providing such services, plaintiff was called upon by the Authority and defendants to analyze and inspect certain aspects of the design and/or construction of buildings comprising the Wildwood Housing Authority Project, known as Commissioner's Court and Sandman Towers (hereinafter, "the Project").

13. On or about October 28th, 1980, the aforesaid contract was amended. Whereas the initial contract had authorized payment to plaintiff up to a limit of ten thousand ($10,000.00) dollars, the amendment authorized payment up to an amount of twenty thousand ($20,000.00) dollars.

14. During late winter and the spring of 1981 the Authority and defendants, knowing that plaintiff had virtually exhausted the twenty thousand ($20,000.00) dollars allocated to him by the second amendment, nevertheless ordered him to provide substantial additional work, including but not limited to preparation of an interim report identifying construction/design defects, suggesting remedial measures, and apportioning responsibility for such defects as among the parties involved in the Project.

15. In so ordering such additional work, the Authority and the defendants never indicated that payment would not be approved to plaintiff for his additional services.

16. On or about April 24, 1981, plaintiff made an oral presentation concerning the results of his investigation to a meeting attended by defendants, other than the commissioners of the Authority. In his presentation the plaintiff indicated among other things, that he had found serious and in some instances, life-threatening defects in the Authority's aforesaid housing facility and in some instances such defects constituted substantial deviations from governmental requirements. The plaintiff indicated that both HUD and the Authority were partially responsible for such deviations in that they had responsibility at the outset of the project for the conformance of plans and specifications to governmental regulations.

17. During the aforesaid meeting, Richard Reinman on behalf of the defendants directed the plaintiff to summarize all the facts and opinions orally presented in a written interim report.

18. During the aforesaid meeting, Leo Dyce on behalf of the defendants expressed displeasure with the

plaintiff's comments about governmental fault in the construction of the project and stated that such comments should not be included in the interim report.

19. In early June of 1981 plaintiff submitted an initial version of his interim report and on or about June 16, 1982, the Authority indicated that that version would be accepted as a final report in satisfaction of the plaintiff's obligation with the Authority.

20. Despite repeated submission of a detailed statement of services performed and invoices, the defendants have declined to pay the plaintiff for services he rendered following exhaustion of the original twenty thousand ($20,000.00) dollars allocated in the contract. On or about December 7, 1982, the Authority notified the Plaintiff that there would be no payment made to him for his aforesaid services.

21. By refusing to honor the contractual arrangement between the Authority and the plaintiff, the defendants have sought to penalize the plaintiff because of their disagreement with opinions expressed in his interim report and oral report concerning government liability in connection with the Project.

22. In refusing to honor their contract with the plaintiff, the defendants have conspired to violate and have violated plaintiff's rights to freely express himself as protected by the First, Fifth and Fourteenth Amendments to the United States Constitution.

23. In so penalizing plaintiff for his expression of professional opinion, defendants have acted intentionally and maliciously.

24. The defendants, in refusing to honor the contract, have acted under color of State and Federal law in that the Authority is a body created and empowered by State law and in that defendants Dyce and Reinman were at all times relevant hereto agents of HUD.

25. As a direct and proximate result of defendants' violations of plaintiff's rights, plaintiff has suffered and continues to suffer substantial damage including the loss of monies owed him by the Authority, loss of interest thereon, loss of business opportunities as well as emotional distress.

COUNT II

26. Plaintiff repeats and realleges as if fully set forth herein the allegations of Count I.

27. Defendants have, by refusing payment in accordance with the aforesaid contract, substantially and materially breached the terms of the contract entered into between the Authority and plaintiff.

28. As a direct and proximate result of defendants' contractual breach, plaintiff has suffered and continues to suffer substantial damage including the loss of monies owed him by the Authority, loss of interest thereon, loss of business opportunities as well as emotional distress.

WHEREFORE, plaintiff demands judgement against the defendants:

A. For compensatory and punitive damages;

B. For legal fees and costs of this action;

C. For such other relief as the Court finds just and equitable.

MULLIN & CASTELEIRO

By /s/ NEIL MULLIN

Plaintiff demands trial by jury with respect to all issues.

/s/ NEIL MULLIN

Dated: July 19, 1983
Hoboken, New Jersey